(1)

91-1730

No. 91-

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PETER D. PERFETTI,
Petitioner,

v.

THE FIRST NATIONAL
BANK OF CHICAGO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Matthew F. Zubek
8855 S. Ridgeland Ave.
Suite 211
Oak Lawn, IL 60453
(708) 430-4280

Attorney of Record for
Peter D. Perfetti

April 1992

QUESTIONS PRESENTED

1. May a Court of Appeals reverse a jury verdict and the trial court's denial of a motion for judgment notwithstanding the verdict in a pretext for discrimination case without thwarting the United States Supreme Court's foundation and rationale for the defendant's "burden of production" requirement versus a "burden of proof" requirement set forth in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), where the defendant's posited legitimate reasons were made up of no more than subjective assertions that the plaintiff lacked the requisite interpersonal and communication skills, in the face of the plaintiff's evidenciary challenges to the factual basis for that conclusion.

2. May a court of appeals reverse a jury verdict and the denial of a motion for judgment notwithstanding the verdict in a pretext for discrimination case without having improperly and unconstitutionally reevaluated the conflicting evidence where the plaintiff showed pretext based upon the inferences properly drawn from the facts reflected in question one above, upon documentary irregularities of the employer, and upon the totality of the evidence.

TABLE OF CONTENTS

Page

Questions Presented.....i

Table of Authorities.....iv

Opinions Below.....1

Jurisdiction.....2

Statement.....3

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals in reversing the jury verdict and the District Court's denial of the Bank's motion for judgment notwithstanding the verdict defeats the foundation and rationale for the employer's "burden of production" requirement versus its being required to meet a "burden of proof" as detailed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and challenges the purpose and integrity of proof requirements of the Discrimination Laws, and of the Seventh Amendment right to the preservation of a jury verdict.....18

Conclusion.....20

TABLE OF AUTHORITIES

CASES: Page

Atlantic and Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962).....25, 26

Basham v. Pennsylvania Railroad Co., 372 U.S. 699 (1963).....32

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....4

Namenwirth v. Bd. of Regents of U. of Wis. Systems, 769 F.2d 1235 (7th Cir. 1985) cert. den. 474 U.S. 1061 (1986).....24

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)..4,5, 18-23

United States Postal Service v. Aikens, 460 U.S. 711 (1983).....31

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969).....32

STATUES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. Sec. 1254(1).....2

28 U.S.C. Sec. 1291.....3

28 U.S.C. Sec. 1331.....2

29 U.S.C. Sec. 621 et. seq.....3,4,16

United States Constitution, Seventh Amendment.....3,25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-

PETER D. PERFETTI,

Petitioner,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

Peter D. Perfetti petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The jury verdict is set forth at page 20a-21a of the appendix to this petition (App. 20a-21a). The unreported decision denying the motion for judgment notwithstanding the verdict is set forth at App. 22a-26a. The unreported decision of the District Court as to back pay, attorney's fees and costs is set forth at App. 27a-31a. The original decision of the Court of Appeals is reprinted at App. 1a-19a. The reported decision of the Court of Appeals appears at 950 F.2d 449.

JURISDICTION

The judgment of the Court of Appeals was issued on December 6, 1991. Rehearing was denied on January 8, 1992. App. 34a-35a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1). District Court jurisdiction was pursuant to 28 U.S.C. 1331, and jurisdiction

in the Court of Appeals was based upon 28 U.S.C. Sec. 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The following provision of the Age Discrimination in Employment Act is pertinent to this case:

Sec. 623(a) It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

STATEMENT OF THE CASE

The Age Discrimination in Employment Act

This case arises under the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. ("ADEA"). Under the ADEA, and pursuant to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v.Burdine, 450 U.S. 248 (1981), an age discrimination plaintiff who is otherwise qualified for a job is allowed to prove his case circumstantially with evidence that the job went to a younger person and that the employer's proffered explanations for its decision were "unworthy of credence." The burden of proof in such a case does not switch. However, once the plaintiff has made out his prima facie case -- that is that he

is in the protected class (over 40 years of age) and qualified for the job that went to a younger person -- the employer's burden is not one of proof but one of production of a legitimate nondiscriminatory reason for his action. The burden is then upon the plaintiff to prove that the employer's explanations were "unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257-8 (1981).

BACKGROUND AND HISTORY OF THIS LITIGATION

Peter D. Perfetti began working for the First National Bank of Chicago in 1971 as a Senior Operations Analyst. As such, he analyzed operations throughout the bank and worked to design and implement procedures to increase the cost efficiency of those operations.

Perfetti was later made a Cost Control Manager overseeing six operations analysts at the Bank's VISA division. He was later appointed Manager of Training and Development of Operations Analysis, where he trained various personnel, including management, in operations analysis. He returned to the Operations Analysis Group in 1984, and in 1985 lodged a complaint to his supervisor about a low performance evaluation despite exceeding his cost recommendation goals.

In early 1986 Perfetti was passed up for a promotion, which was the subject of one count of his complaint but dismissed out on summary judgment because Perfetti did not file his EEOC charge within 300 days.

In September 1986, the entire

Operations Analysis Group was reduced in force or RIF'd, and Perfetti and his departmental co-workers were terminated. The RIF was never at issue in this case. It was after this RIF that Perfetti bid on and was denied five separate positions, three of which were subject to a grant of summary judgment and two of which went before the jury.

The first of the two positions was for an Operations Analyst I which listed the following as the qualifications:

> 3-6 yrs. consulting and/or related operations management experience necessary. Previous project management essential (knowledge of methods, analysis, work measurement etc.) Strong interpersonal skills as well as analytical capabilities and an ability to work independently are required to function successfully in this position.

Robert Chapman, the recruiter for

both positions at issue, after interviewing Perfetti and reviewing his qualifications for the job, admitted that he met the minimum qualifications, and referred him for an interview with Maria McSweeney, the hiring manager.

McSweeney testified that during this interview, Perfetti told her about an argument that he had with a vice president in which Perfetti told her that he was right and the vice president was wrong about how to do a project. Her testimony was that after the interview, she concluded that he was not a team player, and lacked the requisite "communication and interpersonal skills" for the position.

Perfetti testified that he never made such a statement.

McSweeney reviewed Perfetti's job

opportunity request form which

summarized his background:

> Fifteen years as an Internal Consultant, four years as a Cost Control Manager for the First Card Division. Designed and implemented the product costing system in the bank and at the First Card Division. Self-initiated methods/measurement studies resulted in over two million dollars in identified savings - Managed six Operations Analysts and one Financial Analyst during the implementation of Product Costing System, Work Measurement and Methods Projects. Designed and presented audio visual training programs on Labor Performance and the Product Costing System to Product Managers, Operations Analysts and Line Managers.

McSweeney's notes on the bottom of

Perfetti's Job Opportunity Request Form

stated as follows:

"Work experience appropriate. Consensus opinion was that other candidates had skill/experience/education packages that might be preferable.
Candidate will not be pursued further at this time."

As to work experience, Perfetti, who

was then 55 years old, had been at the bank 15 1/2 years. The person that was hired, Rosie Carter, had eight years at the bank and was 32 years old.

While Carter had an M.B.A. in management, Robert Chapman, the recruiter for both positions, testified that he didn't think you could pinpoint any one thing about the M.B.A. that would make a person a better candidate - only that it shows "some qualities" that "could possibly" make you a better candidate. Perfetti supplemented his associates degree in industrial electronics and electrical power with college courses in industrial and bank management and industrial engineering.

McSweeney testified that she was familiar with Perfetti's long career with the Bank, but because she already

formed her opinion of his interpersonal skills, she never looked into his background or accomplishments.

Shahid Khawaja, an operations analyst who had worked under Perfetti for three and one-half years at VISA, testified on rebuttal that Perfetti had an open management style, and that Perfetti spent extra time training those employees that needed it, that they had a "good team", and that they were known among the other groups within the bank for having a "good team." He found Perfetti to be "very helping", and an effective communicator. Khawaja characterized Perfetti's interpersonal skills as excellent and testified that he enjoyed working under Perfetti. Charles Bills, also an operations analyst at VISA, testified similarly in

Perfetti's case in chief.

After Perfetti's salary continuation expired on February 28, 1987, the second position was announced. On March 5, 1987, the second day the position was open, Perfetti applied for that facilities coordinator I position. The listed qualifications were:

> 6 yrs. operations management experience or equivalent. Proven managerial and organizational skills. Experience in Mortgage area is preferred. Excellent verbal and written communication skills. Ability to be flexible, innovative and aggressive, especially as expansion of products and activities will be ongoing.

Robert Chapman was also the recruiter for this position, and again Perfetti admittedly met the minimum requirements for the position. Chapman testified he never referred Perfetti's resume to the hiring manager,

Raymond Altman. Chapman testified that Bank regulations prevented him from submitting Perfetti's bid until the position was open for five business days. Chapman contended that when he called the hiring manager, Ray Altman, the position had already been filled by an internal candidate named Tom Jarecki, whom Altman considered "ideal" for the job. The normally generated computerized Bank forms were never prepared to reflect Jarecki's hire, and no information was available to verify that the job was filled by him within the five-day period. The Bank's regulations required that job changes were to be reflected on computer generated personnel action forms. Altman denied knowing whether Perfetti or anyone else had responded to his

bankwide posting.

Jarecki received the job, but testified that he never received the grade promotion or salary increase that this position would have entailed.

Altman testified that Jarecki stayed in the position "a matter of short weeks. I don't think it was a month." After that, Altman took no further bids for the job, testifying that he merged the job responsibilities into another department.

On December 4, 1990, about five weeks before trial, and shortly after Judge Williams denied summary judgment due to the lack of documentation as to Jarecki's hire, a typed memo was produced by the Bank. It was signed by Raymond Altman, and announced Jarecki's placement in the position.

Altman, at his deposition months earlier, had testified not only that no documentation existed to reflect that Jarecki ever assumed this position, but also that no documents existed that would refresh his recollection as to the existence of any such documents. At trial, he testified that he would have prepared such a memo as a fairly common practice, and that he distributed 150-180 copies throughout the bank.

An evaluation form dated February 8, 1988, also signed by Ray Altman, was produced to plaintiff for the first time on January 10, 1990, two days prior to trial. This form, while reflecting that Jarecki took the job, also showed, by his own notes that Jarecki was confused and frustrated and felt he was not suited for the position.

THE FEDERAL LITIGATION

On October 13, 1988, Peter D. Perfetti filed his six-count Complaint against the First National Bank of Chicago in the United States District Court for the Northern District of Illinois alleging discrimination on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 et seq. On November 17, 1989, summary judgment was denied on two of those counts, and the case proceeded to trial on January 12, 1990.

On January 22, 1990, the jury returned a verdict for Perfetti on both counts and awarded him $64,900 in back pay, and $89,700 in front pay. App. 20a. On September 17, 1990, Judge Williams denied the Bank's motion for judgment notwithstanding the verdict ("JNOV").

App. 21a-24a. On November 28, 1990, after accepting briefs from both parties, Judge Williams doubled the plaintiff's back pay award because of the jury's finding of willfulness. Attorney's fees were then awarded to Perfetti and costs were awarded to both parties. App. 24a-28a.

The Bank filed its appeal, and on December 6, 1991, after hearing oral argument, The Seventh Circuit Court of Appeals (Chief Judge Bauer, Senior Circuit Judge Esbach and Circuit Judge Wood) reversed the jury verdict and the denial of the Bank's motion for JNOV. App.29a. That court denied rehearing on January 8, 1992. App. 30a.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS REVERSING THE JURY VERDICT AND THE DENIAL OF THE BANK'S MOTION FOR JNOV, DEFEATS THE FOUNDATION AND RATIONALE FOR THE DEFENDANT'S "BURDEN OF PRODUCTION" REQUIREMENT VERSUS ITS BEING REQUIRED TO MEET A "BURDEN OF PROOF" AS DETAILED IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981), AND CHALLENGES THE PURPOSE AND INTEGRITY OF THE PROOF REQUIREMENTS OF THE DISCRIMINATION LAWS AND THE SEVENTH AMENDMENT RIGHT TO THE PRESERVATION OF THE JURY VERDICT.

THE OPERATIONS ANALYST POSITION

It is not disputed by the First National Bank of Chicago or by the Court of Appeals that Peter Perfetti has established his prima facie case for both counts. That is, that he was over 40 years old, was qualified for the positions, and the positions were awarded to younger individuals. Establishment of the prima facie case "creates a presumption that the employer

unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

The burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant is not required to persuade the court that it was actually motivated by the proferred reasons.

The plaintiff is then given the opportunity to demonstrate that the

proffered reason was not the true reason for the employment decision or "unworthy of credence."

The Supreme Court in Burdine recognized that the Court of Appeals had placed the burden of persuasion on the defendant out of concern that "...if an employer need only articulate -- not prove -- a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate reasons for his actions." 450 U.S. at 257, 258.

The Supreme Court did not believe, however, that limiting the defendant's evidentiary obligation to a burden of production rather than a burden of proof would unduly hinder the plaintiff. It explained:

> "First, as noted above, the defendant's explanation of its legitimate reasons must be clear and

> reasonably specific. This obligations arises both from the necessity of rebutting the inference of the prima facie case and from the requirement that the plaintiff be afforded a 'full and fair opportunity' to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant will attempt to prove the factual basis for its explanation." 450 U.S. at 258.

The court also recognized the liberal discovery rules available to the plaintiff and concluded:

> "Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that proffered explanation lacking a factual basis is a pretext." Emphasis added 450 U.S. at 258.

In the instant case, Maria McSweeney, the hiring manager for the operations analyst position stated that Perfetti lacked the interpersonal and communication skills she desired for the

job. She based this conclusion on a statement she attributed to him at the interview and also upon the interview "as a whole." McSweeney said that Perfetti had told her that he had once had a disagreement with a vice president and that the vice president had been wrong. Perfetti denied having made such a statement and offered testimony from fellow workers as to his superlative interpersonal and communication skills.

The Court of Appeals, however, in reversing the jury's verdict challenges the basis for this court's holding in Burdine. That is, the fears that were recognized and addressed by this Court in Burdine, that if an employer need only articulate -- not prove -- a legitimate non-discriminatory reason for his action, he may compose fictitious,

but legitimate reasons for his actions." 450 U.S. at 457, 458.

McSweeney did not posit a factual basis for her conclusion that Perfetti lacked interpersonal and communication skills -- save the one statement she attributed to him at the interview. Peter Perfetti denied this factual basis for her conclusion, but the Court of Appeals accepted McSweeney's "proffered explanation," discounted Perfetti's denial, and reversed the jury verdict. Were she required to prove either that Rosie Carter was more qualified than Peter Perfetti or that Carter possessed superior interpersonal skills, the Bank would also have been required to establish a factual basis for its assertions. Only in that manner, would discrimination plaintiffs be placed on

an equal footing with the defendant employers in the Courts of Appeal.

In its instant decision, The Seventh Circuit drew an analogy from Namenwirth v. Bd. of Regents of U. of Wis. System, 769 F.2d 1235 (7th Cir. 1985) cert den. 474 U.S. 1061 (1986) involving tenure decisions, stating:

> Although allowing the employer to base employment decisions on subjective factors 'would ordinarily defeat the purpose of the discrimination laws,' we recognized that 'in the case of tenure decisions, we see no alternative.' Tenure decisions are traditionally and necessarily subjective." App. 18a.

It is the Court's willingness to accept the Bank's subjective and conclusory assertions that does indeed "defeat the purpose of the discrimination laws." However, there is an alternative. It is to require the employer to substantiate its assertions

with proof. Otherwise, "interpersonal and communication skills" will become the death knell to all discrimination claims, and will become a tool enabling those who would do so to discriminate with impunity.

PERFETTI'S SEVENTH AMENDMENT RIGHTS

The Seventh Amendment to the United States Constitution provides that:

> "...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States other than according to the rules of the common law." U.S. Const., 7th Amend.

It is the Seventh Amendment that fashions the federal policy favoring jury decisions of disputed fact questions. Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962). There, the court in upholding a jury verdict, and reversing a Court of

Appeals, the Supreme Court stated that "a search for one possible view that will make the jury's finding inconsistent results in a collision with the Seventh Amendment. citations omitted." 369 U.S. 355, 364.

The Seventh Circuit made such a search in the instant case. After Perfetti denied having made the statement attributed to him at the interview, the trial judge allowed the Bank to produce corroborating evidence through McSweeney's co-workers to whom she supposedly related this statement However, the co-workers testimony did not reflect that Perfetti had related an argument to her at the interview, but a hypothetical inquiry as to how he would proceed if he differed with his manager. His attributed response was that he

would not necessarily do things the manager's way, but that he would do things his way.

This difference in testimony between these witnesses who were to corroborate McSweeney's testimony about the alleged argument can lead to a number of conclusions, one of which is that McSweeney was not truthful about her statement and Perfetti was. Another is that the Bank's witnesses fabricated the whole thing and were unable to get their stories straight. However, the Court of Appeals chose to interpret these statements as "corroborating" McSweeney's testimony, as they related the "substance of the remark." App. 12a.

Other testimony from the employer's witness, Nancy Seever, a career counselor was that Perfetti was a "nice

guy.", and that she tried to save the interview. While this statement could obviously, and apparently was, construed by the jury as supporting Perfetti's evidence of strong interpersonal skills, or that she wanted to save the interview because she may have heard that the better candidate was not getting the job, the Court of Appeals, searching for a contrary inference, stated "Seever did this precisely because she recognized that Perfetti was behaving poorly at the time." App. 14a.

Moreover, and perhaps the Court's most blatant imposition upon the jury's function was the inference it drew from McSweeney's in-court explanation of her failure to reflect in her contemporaneous notes that Perfetti lacked interpersonal and communication

skills" but instead wrote that he had an inferior "skill/experience/education" package.

The Court of Appeals concluded from this evidence that McSweeney "simply elaborated on that justification at trial." App. 15a.

Likewise, as to the facilities coordinator position, the Court of Appeals was unwilling to allow any substantial inference from the absence of a critical personnel document, required by Bank rules to be prepared, but was not. This inference was denied even though, without the document, the actual hire date of Jarecki -- and the Bank's contention that the Plaintiff was not given the job because it had already been filled -- could never be verified.

Moreover, the Court of Appeals

refused to allow any inferences in support of the jury's verdict as to the Bank's late production of certain other documents well after discovery cutoff and not until after summary judgment had been denied due to the lack of documentary evidence reflecting that the position had ever been filled.

The Court of Appeals drew two inferences from this late production: 1) That the documents were "entirely corroborative" of the Bank's defense and 2) That they are "not the sort of documents the Bank would have wanted to suppress." It drew these conclusions although the documents were produced after the hiring manager denied that any documents existed to verify Jarecki's hire, after the denial of summary judgment by the District Court, and

despite the fact that one of the documents -- a personnel evaluation of Jarecki -- reflected that Jarecki was unfit for the job.

It is error for a court to require direct evidence of discriminatory intent, and there is seldom eyewitness testimony to the employer's mental processes. United States Postal Service v. Aikens, 460 U.S. 711 (1983). Thus circumstantial proofs and inferences from the evidence must be allowed to be drawn in support of the finding of discrimination in this case.

The trial court recognized, in its denial of the motion for JNOV, but the Court of Appeals would not, that "credibility of First National's witnesses was key." App. 22a. The Court of Appeals has rejected all favorable

substantial inferences from the plaintiff's evidence.

This court has stated that "only when there is a complete absence of probative facts to support the conclusion reached by the jury does a reversible error appear. Basham v. Pennsylvania Railroad Co., 372 U.S. 699 (1963). There, the Supreme Court found it to be error for the trial and appellate courts to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury. See also, Zenith Radio Corp. v. Hazeltine Research, where this court warned that:

> "...appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circum-

> scribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S. 100 (1969).

The Court of Appeals has imposed its inferences and conclusions as to the conflicting evidence to reverse a jury's favorable verdict, and in doing so has violated the fundamental rights granted a prevailing party litigant by the Seventh Amendment to the United States Constitution.

The opinion below works an intolerable injustice to litigants -- plaintiffs and defendants -- who are constitutionally guaranteed a decisive ruling once the jury has rendered its determination on the conflicting facts of the case. The Court should grant review in this case to bring the Seventh Circuit in line

with the decisions of this Court and the dictates of the Seventh Amendment to the United States Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Matthew F. Zubek
8855 South Ridgeland Ave.
Suite 211
Oak Lawn, Illinois 60453
(708) 430-4280
Attorney for Petitioner

April, 1992

A P P E N D I X

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-3861

PETER D. PERFETTI,

Plaintiff-Appellee,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 8714—**Ann Claire Williams,** *Judge.*

ARGUED SEPTEMBER 26, 1991—DECIDED DECEMBER 6, 1991

Before BAUER, *Chief Judge,* WOOD, JR., *Circuit Judge,* and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* When Peter Perfetti was 54 years old, he lost his job at The First National Bank of Chicago (the "Bank"). Perfetti's unit had been disbanded as part of a reduction in force. For five months thereafter, the Bank kept Perfetti on the payroll while he searched for a new job. During this period, Perfetti applied for more than 550 jobs without success. At the same time, he was allowed to bid for positions within the Bank. Perfetti never did find another job at the Bank, although he applied for at least five separate positions. Based on these adverse employment decisions, he sued under the

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The district court granted summary judgment for the Bank on three of the five positions. R. 89. Perfetti went to trial on the remaining counts, which concerned a position as "facilities coordinator" and a position as "operations analyst." The only issue was whether Perfetti proved that the Bank's proffered justifications for not rehiring him were "unworthy of credence" and therefore pretextual. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The jury found for Perfetti on both counts. On appeal, the Bank argues that there was insufficient evidence to support the jury's finding that the Bank's proffered reasons were unworthy of credence.[1] We agree. Because the evidence of pretext regarding both employment decisions is insubstantial, we reverse and remand for entry of judgment for the Bank.

Discussion

1. The Question on Appeal

Because Perfetti's claim has already gone to the jury, we need not concern ourselves with the intricacies of his method of proof at trial; the only question on appeal is "whether there was sufficient evidence for a reasonable jury to find that age was a determining factor" in the hiring decisions. *Brown v. M&M/Mars*, 883 F.2d 505, 507 (7th Cir. 1989). In making this determination, we must resolve any evidentiary conflict and every permissible inference in favor of the party who won the verdict. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984). Furthermore, we do not judge the credibility of witnesses. *Id.* "Our role is not to weigh the evidence in search of a preponderance as would a jury, but it is instead the more restrictive function of determining if the evidence in support of the ver-

[1] Because of our disposition of the case, we need not reach the Bank's other arguments.

dict is *substantial*; a mere scintilla of supporting evidence will not suffice." *Id.*

Whether Perfetti's evidence is substantial is an extremely narrow question in this case, because Perfetti's evidence of liability went exclusively toward proving that the Bank's proffered explanations were "unworthy of credence." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), allow a plaintiff to prove employment discrimination with any of four different types of evidence. In general, a plaintiff may prove discrimination either directly, by proving that age was a determining factor in the employer's decision, or indirectly, by proving that the employer's proffered explanation is pretextual. Under the direct method of proof, the plaintiff's evidence may be either direct or circumstantial. Thus, the first type of evidence in a discrimination suit is direct evidence that age was a determining factor, such as discriminatory statements uttered by the employer's decision-maker. The second type of evidence is circumstantial evidence that age was a determining factor, such as a statistical imbalance in the employer's work-force. *McDonnell Douglas* and *Burdine* also allow the plaintiff to prevail under an indirect method of proof. Under this method, the plaintiff must first prove his or her *prima facie* case. The burden of production then shifts to the employer, who must articulate a lawful reason for its decision. To prevail, the plaintiff retains the burden of proof and must prove that the employer's articulated rationale is pretextual, either by showing that a discriminatory reason more likely motivated the employer or that the employer's proffered reason is "unworthy of credence." *See generally La Montagne*, 750 F.2d at 1409-10. The theory behind the indirect method of proof is that evidence of discrimination, including even circumstantial evidence, may be extremely difficult for a plaintiff to discover. Therefore, if the plaintiff proves that the employer's proffered explanation is pretextual, the jury may infer discrimination from that

proof alone. *Id.* The indirect method of proof thus allows a plaintiff to prevail by bringing two additional types of evidence. The third type of evidence, therefore, is direct evidence of pretext, such as a contradiction between the employer's proffered justification at trial and documentary evidence from the time of the decision, or a contradiction among the witnesses to the employment decision at issue. Last, the fourth type of evidence is circumstantial evidence of pretext, such as evidence that the proffered justification is not a genuine job requirement or has been inconsistently applied to other employees.

In the present case, almost all of Perfetti's evidence fell into the fourth and weakest category, circumstantial evidence of pretext. He employed the indirect method of proof under the ADEA. He did not present even a scintilla of evidence that the Bank had a discriminatory attitude regarding his or anyone else's age, or that the Bank's policies had a discriminatory age-based impact on his or anyone else's employment. Furthermore, Perfetti's proof of pretext[2] was almost entirely indirect; he did not present even a scintilla of evidence to indicate that the Bank's reasons were pretexts for age discrimination. Age has been raised in this case only twice: Perfetti was in his mid-fifties at the time of the adverse employment decisions, and the persons who were hired in his stead were younger than he.[3] Finally, the Bank's employees did not contradict one another or the documentary evidence. Perfetti's only direct evidence of pretext is his own testimony

---

[2] There was no conflict regarding whether Perfetti made out his *prima facie* case or whether the Bank articulated lawful reasons in response. The case turned entirely on whether the Bank's articulated reasons were pretextual.

[3] Even Perfetti does not pretend that the evidence in this case bears any connection to age. In his closing argument, counsel for the plaintiff told the jury that age was in Perfetti's job application and "in his face." Tr. at 572. Likewise, at oral argument in this court, counsel for the plaintiff could not tie age to the Bank's decisions regarding Perfetti in any way.

contradicting a single detail of the testimony of one of the Bank's witnesses. As a result, Perfetti's case is virtually as indirect and circumstantial as possible; we have before us a "pure" unworthy of credence claim.

We emphasize that Perfetti's failure to bring any evidence regarding age does not defeat his claim *per se*; "[t]he special virtue of the indirect method of proof is that it allows victims of age discrimination to prevail without presenting *any* evidence that age was a determining factor in the employer's motivation." *La Montagne*, 750 F.2d at 1409-10.[4] Holding to the contrary would violate one of the purposes of *McDonnell Douglas* and *Burdine*, which is to permit plaintiffs to recover, even if they are unable to discover evidence of discrimination, simply by proving that the employer's proffered justification is unworthy of credence.

Once we accept that Perfetti's reliance on circumstantial "unworthy of credence" evidence does not defeat his claim, it is tempting to go to the other extreme. Because Perfetti's evidence goes only to the question whether the

---

[4] Thus, we do not ground our decision in the distinction between proof of pretext and proof of pretext *for discrimination*. The significance of this distinction is that proof of pretext *allows*, but does not *require*, the fact-finder to infer discrimination. *Benzies v. Ill. Dept. of Mental Health*, 810 F.2d 146, 148 (7th Cir.) (proving pretext "is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law"), *cert. denied*, 483 U.S. 1006 (1987). We have never held that evidence of pretext, without evidence of pretext for discrimination, did not allow the fact-finder to infer discrimination. *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987), made a feint in that direction. In that case, we reversed a bench trial verdict for the plaintiff. Although we mentioned the difference between proof of pretext and proof of pretext for discrimination, the decision in fact turned on the distinction between a "mistake" and a pretext. A business termination which is "ill-informed or ill-considered," we held, is not a "pretext." *Id.* at 559. In *Brown v. M&M/Mars*, 883 F.2d 505, 510-11 (7th Cir. 1989), we again noted the distinction between pretext and pretext for discrimination, but only in upholding the jury verdict for the plaintiff.

Bank's proffered justification is "unworthy of credence," the jury, in finding for the plaintiff, necessarily found the Bank's witnesses and explanations "unworthy of credence." But we cannot judge the credibility of the Bank's employees. Can we reverse a jury verdict based solely on a lack of *credence* without infringing on the jury's exclusive right to judge *credibility*?

The answer is, "We can." Perfetti's lack of evidence regarding age cannot insulate his jury verdict from review for sufficiency of the evidence. Such a holding would require that virtually every unworthy of credence claim go to the jury. Let us backtrack for a moment. The standards for granting summary judgment, a directed verdict, and a judgment notwithstanding the verdict ("JNOV") are essentially the same; all of these motions "call upon the court to make basically the same determination—that there is no genuine issue of fact and that the moving party is entitled to prevail as a matter of law." Wright & Miller, *Federal Practice and Procedure* § 2713.1 at 613, § 2537 at 599 (1983). If we could never reverse a jury verdict for the plaintiff in an "unworthy of credence" claim on the ground of insufficiency of the evidence, then a district court could never grant summary judgment or a directed verdict for the employer; in every claim, the jury would have to be given its opportunity simply to disbelieve the employer. This result does not follow from *Burdine* and would overrule the basic requirement that a jury verdict be supported by "substantial" evidence. The purpose of *Burdine* was not to allow plaintiffs to go to the jury without presenting any evidence at all; its purpose was to allow plaintiffs to prove discrimination without presenting any evidence *of discrimination*, and solely with evidence of pretext. Furthermore, such a holding would be perverse. Cases based on indirect and circumstantial evidence of pretext should not be less subject to dismissal for insufficiency than cases based on evidence which is *more* probative of discrimination.

Having established that Perfetti's narrowly focused evidence neither defeats nor insulates his claim as a matter

of law, we come to what the nature of his evidence does do. Perfetti's reliance solely on the fourth type of evidence, save his own contradiction of a single detail of one witness's testimony, narrows our determination whether there was substantial evidence to support the verdict. Because Perfetti did not have any proof regarding age at trial, his entire burden of having "substantial evidence" falls on his "unworthy of credence" evidence. Under these circumstances, Perfetti must have presented sufficient evidence for a reasonable jury to infer, *solely on the basis of indirect evidence that the Bank's proffered explanations were unworthy of credence*, that the Bank discriminated against him on account of his age. Thus, we reverse not because Perfetti failed to present direct or circumstantial evidence regarding age, but because he presented almost exclusively indirect evidence of pretext *and even that evidence was insubstantial.*

2. The Evidence at Trial

A. Facilities Coordinator Position

The Bank's rules regarding employment decisions stipulate that before an external candidate for any position can be considered, all internal candidates must be considered and eliminated. Because Perfetti had been fired by the time he applied for the facilities coordinator position, he was considered an external candidate for that job. The Bank's proffered explanation for not hiring Perfetti was that an internal candidate, 41-year-old Thomas Jarecki, filled the position first. As a result, the human resources recruiter, Robert Chapman, never even forwarded Perfetti's application to, or discussed the application with, the person who made the hiring decision, Ray Altmann. Tr. at 77, 173. Moreover, Altmann did not even know who Perfetti was. Tr. at 290. If Altmann did not even know that Perfetti was applying for the job, the Bank argues, how could he have denied Perfetti the job on the basis of his age?

At trial, Perfetti attempted to puncture this justification by hypothesizing a "flim-flam." To support this theory, Perfetti relied on certain irregularities in Jarecki's promotion. The Bank did not have any computer-generated documentation to specify the date on which Jarecki took the job. At first, the only documentation regarding Jarecki's promotion the Bank could produce was a handwritten note from Chapman. Then, a month before trial, the Bank produced a type-written memo from Altmann that Altmann had not remembered having written. And last, two days before trial, the Bank produced a typed evaluation form which included references to the time Jarecki spent in the facilities coordinator position. Perfetti also noted that Jarecki remained in the job for only a few weeks and never received the raise that ought to have accompanied the promotion. Perfetti thus argued that because Jarecki left the position so quickly, he was obviously unqualified.

Initially, Perfetti wove this highly circumstantial evidence into an hypothesis that Jarecki had never actually moved into the position; the Bank had been dissembling all along. Plaintiff's Opening Statement, Tr. at 6. Later, Perfetti apparently recognized that there was no reason for the jury to believe that Jarecki had not filled the position; unrebutted testimony from several individuals, as well as the aforementioned note, memo, and evaluation form, were all to the contrary. Thus, Perfetti reformulated his theory. Jarecki did move into the position, but not legitimately. Altmann promoted Jarecki as a "flim-flam" for the purpose of preventing Perfetti from getting the job. Plaintiff's Closing Statement, Tr. at 575. A few weeks later, with that goal accomplished, Jarecki vacated the position.

This theory is reminiscent of the plaintiff's "sham" theory in *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410-11 (7th Cir. 1984). La Montagne argued that his employer had discriminated against him by firing him on account of his age. The employer

in that case, like the Bank in this one, justified discharging La Montagne on account of his interpersonal skills; the president simply did not get along with La Montagne. In its defense, the employer noted that it first offered La Montagne's job to a 47-year-old man only four years younger than La Montagne himself. After the 47-year-old rejected the offer, the job eventually fell to a 34-year-old. La Montagne attempted to escape the force of the initial offer by arguing that it was a "sham." The employer offered the job to the 47-year-old, knowing that he would decline, merely to mask its true motivation, which was to hire the 34-year-old. We rejected this argument, noting that "there is no direct evidence in support of the theory, and the circumstantial evidence is too insubstantial to support it." *Id.* at 1410-11.

Perfetti's flim-flam is hardly more supported than La Montagne's sham.[5] Altmann never received Perfetti's application. There is no evidence to indicate that Altmann even knew that Perfetti existed, let alone knew that he wanted the job, let alone knew Perfetti's age, let alone

[5] The Bank makes two unavailing arguments which we note in passing. First, the Bank tries to avail itself of the rule that "[s]tatements made by inferior employees are not probative of an intent to discriminate by the decision-maker." *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1221 (7th Cir. 1991). Thus, the Bank argues that because Altmann was the sole decision-maker, Chapman's failure to refer Perfetti's application cannot support an inference of discrimination. The Bank ignores the fact that Altmann could not have considered Perfetti for the job unless Chapman referred Perfetti's application to him first. As a result, Altmann was not the sole decision-maker, and the rule of *Aungst* does not apply. Second, the Bank argues that because the irregularities in its documentation of the Jarecki promotion postdated the decision not to hire Perfetti, those irregularities are irrelevant to the case. *See Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1393 n. 5 (7th Cir. 1990). In *Holmberg*, however, we did not rely on simple chronology. Rather, we held that deviations from procedure are not relevant to a discrimination claim when those deviations do not relate to the employment decision at issue. The Bank cannot benefit from this rule either.

wanted to deny him the job, let alone denied him the job on account of his age. To the contrary, the series of speculations that would be required to fill these gaps ends at square one, because Altmann's testimony that he did not even know Perfetti existed was unrebutted. Nor is there any evidence to indicate that Chapman ever discussed with Altmann the possibility of Perfetti interviewing for that job, let alone discussed with Altmann the possibility of denying Perfetti the job, let alone wanted to deny Perfetti the job himself. Again, the necessary conjecture stalls at the outset, because Chapman's testimony that he never discussed Perfetti with Altmann was unrebutted.

Not only does the evidence lend little support to Perfetti's theory, but it also undercuts it. Perfetti places great stock in the fact that the three independent documents, all verifying Jarecki's promotion, were tardily produced and not computer-generated. The Bank's tardy production of these documents does not necessarily fit into Perfetti's theory, however; these documents were entirely corroborative of the Bank's defense and, had they been located earlier, might have justified summary judgment on this count. These are not the sort of documents the Bank would have wanted to suppress. If Perfetti is suggesting that the Bank has fabricated all three documents, we do not believe that the minor irregularities in the Bank's production of them, without any affirmative evidence from Perfetti, can support the weight of his elaborate theory. The jury could not reasonably have disbelieved all of the Bank's uncontradicted oral and documentary evidence, *see Jang v. Biltmore Tire Co., Inc.*, 797 F.2d 486 (7th Cir. 1986) (upholding directed verdict for employer when plaintiff's only argument was that he was qualified and that jury could have disbelieved employer's proffered justification because it had produced no supporting documentation), nor could the jury reasonably have inferred from disbelieving all that evidence that the "flim-flam" actually occurred. The circumstances under which Jarecki vacated

the facilities coordinator position also undercut Perfetti's theory. According to Perfetti's theory, Jarecki moved into the job to foreclose Perfetti, presumably to allow the Bank eventually to hire a younger candidate. But the uncontradicted evidence indicates that no younger candidate ever did fill the position. After Jarecki left the job a few weeks later, the Bank simply eliminated it and merged its responsibilities into another position. Tr. at 290. We hold that no reasonable jury could have inferred from the slim and ambiguous evidence adduced by Perfetti that the Bank's proffered justification was pretextual.

B. The Operations Analyst Position

To fill the operations analyst position, the Bank posted a "Job Opportunity Bulletin" describing the position and its requirements. The bulletin stated that "strong interpersonal skills" were necessary "to function successfully in this position." Plaintiff's Ex. 12. The position required strong interpersonal skills because it involved consulting with numerous employees within the firm. Tr. at 199. Evaluation of candidates' interpersonal skills fell on Maria McSweeney, who worked for the head of operations for the consumer bank area. McSweeney interviewed Perfetti for almost an hour. After the interview, she noted on his Job Opportunity Request Form:

> Work experience appropriate. Consensus opinion was that other candidates had skill/experience/education packages that might be preferable. Candidate will not be pursued further at this time.

Plaintiff's Ex. 23. At trial, McSweeney testified that she decided not to hire Perfetti because another candidate, Rose Carter, had a superior "skill, experience, education package[ ]." Tr. at 196. When pressed, McSweeney specified that based on her hour-long interview with Perfetti, she concluded that he did not have the excellent interpersonal skills necessary for the position, as specified in the original bulletin. She testified that an internal consult-

ing job requires the consultant to be a "team player." McSweeney decided that Perfetti was not a team player based on his "whole communication skills and demeanor throughout the interview," Tr. at 209, as well as a particular remark he had allegedly made. According to McSweeney, Perfetti told her that he had once had a disagreement with a vice president; Perfetti insisted that the vice president had been wrong. Tr. at 200.

Two witnesses corroborated McSweeney's testimony. The manager of the Bank's career counseling center, Nancy Seever, testified that Perfetti was acting "like a jerk" at the time and had an "attitude problem." Tr. at 429, 431. His attitude was that the bank owed him a job. Tr. at 429. A human resource recruiter for the Bank, Robert Chapman, testified that "at that point in time Mr. Perfetti was somewhat angry, hostile, came across being somewhat egocentric." Tr. at 190. These witnesses also supported McSweeney's testimony regarding Perfetti's unwise remark. Seever testified that Perfetti often discussed his interviews with her. Perfetti once told her that in a particular interview, he had told the interviewer that if he ever disagreed with a manager in the office, he would do things his way. Tr. at 427. In addition, Chapman testified that McSweeney had related the substance of this remark to him within a few days of the interview. Tr. at 554-55.

To impeach McSweeney's justification of "interpersonal skills," Perfetti argues that, based on two former coworkers' testimony, he did in fact have good interpersonal skills. Tr. at 140-44; 490-93. Perfetti also casts doubt on the veracity of McSweeney's justification with his testimony that he never made the offending remark to her. And last, Perfetti argues that McSweeney's testimony was inherently incredible. Aside from some clearly insufficient contentions,[6] this evidence constituted the entirety of Perfetti's case regarding the operations analyst position.

---

[6] Perfetti's other "evidence" is not probative of pretext. For example, Perfetti argues that the career counselor failed to inform

(Footnote continued on following page)

The testimony that Perfetti had good interpersonal skills utterly failed to rebut McSweeney's proffered justification. The other employees' opinions about Perfetti concerned his interpersonal skills in general and over time. But McSweeney based her decision on a particular interview and a particular point in time. Two other witnesses testified that, at that particular time, Perfetti was bitter, disaffected, and acting like a "jerk." The plaintiff offered no testimony to rebut this testimony. All that remains is testimony about the plaintiff's qualities in the past. Such testimony does not prove that reasons based on the present are pretextual. *See Jang*, 797 F.2d at 490 (even if jury could find that employee's past performance was good, that finding would not rebut employer's justification that "changing business and changing job description had outgrown" employee's capabilities). In addition, other employees' impressions of Perfetti were never communicated to McSweeney; she testified that she never spoke to Perfetti's co-workers about his interpersonal skills, Tr. at 210, and neither of these witnesses had ever related their opinions to McSweeney. Tr. at 147-48, 497. The only person who communicated her opinion to McSweeney

---

[6] *continued*

him that he could bid on two positions within the Bank at once. But McSweeney's decision regarding a specific position had nothing to do with Perfetti's freedom to bid on another position simultaneously. Perfetti also argues that Chapman's referral of Perfetti's application to McSweeney evinces pretext. Chapman's decision that Perfetti's application merited referral hardly impeaches McSweeney's testimony that Perfetti was obnoxious in the interview, however. Moreover, just because an applicant is minimally qualified does not mean the applicant ought to have been hired. *See Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1260 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2826 (1991). And finally, Perfetti argues that the Bank's failure to call Rose Carter to testify justifies an inference that Carter's interpersonal skills were inferior to Perfetti's. The function of the jury is not to compare interpersonal skills by observing the witnesses' demeanor on the stand, however; such a holding would have the unfortunate effect of making the court a "super-personnel department." *Id.*

was Nancy Seever, who tried to convince McSweeney that Perfetti was a nice guy. Seever did this, however, *precisely because* she recognized that Perfetti was behaving poorly at that time. Although testimony regarding the plaintiff's abilities may sometimes be relevant to the question of pretext, *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 18-19 (7th Cir. 1987), in this case the co-workers' testimony failed to rebut McSweeney's conclusion that Perfetti made a poor impression at the time. And even if McSweeney's conclusion was mistaken, a mistaken business decision is not a pretext. *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

Perfetti also testified that he did not make the offending remark to McSweeney. Tr. at 544-45. Even if we resolve this credibility dispute in favor of Perfetti, as we must, this scintilla of evidence lends little support to the verdict. McSweeney testified that she made her decision based on the entire interview with Perfetti, not on a single remark. Two witnesses other than McSweeney, a career counselor and a human resource recruiter within the Bank, also testified that Perfetti had a bad attitude at that particular point in time. This testimony is unrebutted and is sufficient to justify McSweeney's hiring decision. *See La Montagne*, 750 F.2d at 1415 (holding that reasonable jury could not have found that employer's proffered justification regarding interpersonal skills was pretextual when president testified without rebuttal that he was annoyed with plaintiff). Even if Perfetti did not make the offending remark, no reasonable jury could have concluded that Perfetti had not genuinely made a poor impression on McSweeney.

All that remains of Perfetti's case is his general assertion that he proved pretext because McSweeney's testiony "lacks credibility." McSweeney may have appeared somewhat evasive at trial. But to avoid a directed verdict or a JNOV, "[a] plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. . . . [A] plaintiff must offer

substantial evidence to support the argument." *Jang*, 797 F.2d at 490; *see also* Wright & Miller, *Federal Practice and Procedure* § 2527, at 563 (1971) (A party cannot meet its burden of proof "by relying on the hope that the jury will not trust the credibility of the witnesses. . . . There must be some affirmative evidence. . . ."). In some circumtances, of course, a decision-maker's testimony may be so riddled with blatant inconsistencies or negative admissions that it could lend much support to a verdict for the plaintiff. If at the time of the adverse employment decision the decision-maker gave one reason, but at the time of the trial gave a different reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification. *E.g., Graefenhain*, 827 F.2d at 16, 21 (supervisor's unsupported attack on Graefenhain's qualifications). In this case, however, McSweeney did not bring up a new justification for refusing to hire Perfetti. At the time of his interview, she noted that his "skill/experience/education" package was inferior to that of other candidates, and specified to Seever that Perfetti had interviewed poorly. She simply elaborated on that justification at trial. A jury may also base a finding of pretext on a decision-maker's testimony if that testimony is internally inconsistent or contradicts other aspects of the employer's case. *E.g., id.* at 16, 22. In Perfetti's case, McSweeney did not remember every detail of her interview with Perfetti. But the absence of these minor details is very different from an outright consistency. Finally, if a decision-maker made damaging admissions at trial, these could certainly support a finding of pretext. *E.g., Tye v. Polaris Joint Voc. Sch. Dist. Bd. of Educ.*, 811 F.2d 315, 319 n. 2 (6th Cir.) (decision-maker admitted that he did not have any reasons for adverse employment decision, and that proffered justification had been constructed for litigation), *cert. denied*, 484 U.S. 924 (1987). The Bank's employees' testimony contained no such admissions, however. Indeed, the testimony of the Bank's employees contained no post hoc rationalizations, inconsistencies, or admissions that would support the verdict. Perfetti's only affirmative evidence was his denial of one

detail in McSweeney's testimony. We hold that no reasonable jury could have found the Bank's justification pretextual based on this scintilla of evidence.

In so holding, we recognize the ease with which employers may use subjective factors to "camouflage discrimination." *Namenwirth v. Bd. of Regents of U. of Wis. System*, 769 F.2d 1235, 1243 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986). To prevent employers from masking discrimination behind an incantation of subjective factors, we have held that, under many circumstances, subjective factors may be insufficient to justify the employer's hiring decision. Perfetti has not presented sufficient evidence or authority to avail himself of any of those circumstances, however. Perfetti did not present evidence to indicate that the Bank's requirement of excellent interpersonal skills was disingenuous or inconsistently applied. *Cf. Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1326 (7th Cir. 1987) (upholding jury's finding that proffered justification of seniority was pretextual when employer presented no evidence that it actually had seniority system or that system would produce claimed result), *vacated on other grounds*, 486 U.S. 1020 (1988); *Christie v. Foremost Ins. Co.*, 785 F.2d 584, 586-87 (7th Cir. 1986) (upholding jury's finding that proffered justification of "standard policy" was pretextual when plaintiff presented evidence that employer's own managers did not know of policy and that policy would not have produced claimed result). Nor did Perfetti adduce evidence that McSweeney could and should have evaluated Perfetti's interpersonal skills by objective criteria. *Cf. Christie*, 785 F.2d at 586-87 (upholding jury verdict of pretext when employer relied on subjective judgment about plaintiff's capabilities even though proffered explanation was objective and plaintiff was objectively superior to employee who was not fired). Last, Perfetti did not present evidence that McSweeney's decision was arbitrary because of a failure to investigate more thoroughly. *Cf. Tye*, 811 F.2d at 320 ("Where a decision-maker does not possess any information on which to choose between two individuals, . . . [w]here no . . . attempt is

made [to discover such information], and [where] the employer gives evasive and contradictory testimony regarding the choice," plaintiff may be able to prove pretext). Granted, McSweeney did not explore Perfetti's application in great detail. But Perfetti does not argue that an interviewer must explore an applicant's credentials thoroughly, even if that applicant has made a poor impression in his or her interview. Nor does Perfetti cite any authority for that proposition.

If Perfetti had adduced any of the above types of evidence, his jury verdict might have sufficient evidentiary support. Of course, in requiring such evidence we are not back-handedly requiring ADEA plaintiffs to bring evidence tying the employment decision to an impermissible consideration of age. Many of the types of evidence that Perfetti lacks have no connection to age. Perfetti's verdict might be supported if the record indicated that the job requirement of interpersonal skills was disingenuous or inconsistently applied; that McSweeney could and should have investigated his application objectively or more thoroughly; that the testimony of the Bank's employees was inconsistent with their deposition testimony, with one another's testimony, or with the documentary evidence. Evidence like this is the weakest form of evidence in an employment discrimination case; it is circumstantial and goes only to the question of pretext. Nevertheless, we reiterate that evidence of this nature may be sufficient to support a jury verdict. Because even the cumulative effect of Perfetti's circumstantial evidence of pretext is insubstantial, however, no reasonable jury could have found McSweeney unentitled to rely on a personal interview in choosing the best person for the position.

A contrary result would make personal interviews an extraordinarily hazardous hiring tool. It is hard to imagine a human being so heinous that he or she could not muster a single witness to testify to his or her favorable interpersonal skills. In Perfetti's case, the only evidence beyond that testimony is Perfetti's uncorroborated statement contradicting a portion of what happened in the personal

interview; McSweeney's asserted lack of credibility is not, of course, evidence. If Perfetti's self-serving contradiction of a single detail of McSweeney's testimony could support the verdict, then it would be virtually impossible for a judge to direct a verdict or to grant JNOV in an unworthy of credence case. And, as explained above, it would be similarly impossible to grant summary judgment for the employer in such a case. We refuse to hold that every "unworthy of credence" claim must go to the jury.

Perfetti's case is very similar to *Namenwirth v. Bd. of Regents of U. of Wis. System*, 769 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986). In that case, the magistrate found that the plaintiff, an assistant professor, was qualified for tenure. But the university denied the plaintiff tenure on the ground that other candidates were even more qualified because they had a greater academic potential. We held that the university's justification was not pretextual. When a number of qualified persons apply for a few open positions, mere qualification does not mean that the applicant must get the job. And in choosing between different candidates, all of whom are qualified, an employer may legitimately use subjective qualifications. *Id.* at 1242. Although allowing the employer to base employment decisions on subjective factors "would ordinarily defeat the purpose of the discrimination laws," we recognized that "in the case of tenure decisions we see no alternative." Tenure decisions are traditionally and necessarily subjective. *Id.* at 1243. Thus, we upheld the entry of judgment for the university. *See also Nellis v. Brown County*, 722 F.2d 853, 860 (7th Cir. 1983) (upholding reliance on subjective factors when process "inherently subjective"). Like *Namenwirth*, Perfetti had the objective qualifications for the position, but so did another applicant, Rose Carter. Also like *Namenwirth*, the position for which he applied required subjective judgments. McSweeney chose between two qualified candidates based on a personal interview with them. The jury could not reasonably have considered this business decision pretextual.

Conclusion

Because Perfetti did not present substantial evidence that the Bank's proffered justifications for not hiring him were unworthy of credence, we hold that no reasonable jury could have found the Bank guilty of age discrimination. Accordingly, the judgment is REVERSED. We REMAND for entry of judgment in the Bank's favor.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—12-6-91

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

JUDGMENT IN A CIVIL CASE

PETER D. PERFETTI,
v. CASE NO. 88 C 8714

THE FIRST NATIONAL
BANK OF CHICAGO,

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff, PETER D. PERFETTI and against defendant, THE FIRST NATIONAL BANK OF CHICAGO in the total

amount of $154,600.00 plus costs of this action.

January 22, 1990

H. STUART CUNNINGHAM
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PETER D. PERFETTI,	)	
	)	
Plaintiff,	)	
	)	Case No.
v.	)	88 C 8714
	)	
THE FIRST NATIONAL BANK OF CHICAGO,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Peter Perfetti sued First National Bank in a six count complaint for discriminating against him due to his age for six separate hiring decisions. The court granted summary judgment in favor of First National Bank on four counts. Counts 2 and 5 were tried before a jury, which returned a verdict for Mr. Perfetti. The jury awarded compensatory damages of $64,900 and front pay damages of $89,700. The jury

also found that First National Bank's violation of the ADEA had been willful. First National Bank moves for judgment notwithstanding the verdict. Mr. Perfetti seeks reinstatement and doubling of his backpay damages under 29 U.S.C. Sec. 626(b). Both sides ask for their costs as prevailing parties. Mr. Perfetti asks for his attorney's fees. The court denies First National's motion for Judgment Notwithstanding the Verdict. The court denies Mr. Perfetti's request for reinstatement. The court orders further briefing on the issues of doubling backpay, costs, and attorney's fees.

In ruling on a motion for Judgment Notwithstanding the Verdict, the court looks at the evidence, together with all reasonable inferences

drawn from it, in a light most favorable to the non-moving party. If the evidence as a whole supports the verdict, the Judgment Notwithstanding the Verdict motion must be denied. Cygnar v. City of Chicago, 865 F.2d 827, 834 (7th Cir. 1989). The court may not itself weigh the evidence or resolve conflicts in testimony. That is the function of the jury. Id. The evidence in this case, while thin, easily meets this standard. For both counts, the credibility of First National's witnesses was key. In Count 2, the jury could have chosen to not credit Ms. McSweeney's proffered reasons for not hiring Mr. Perfetti. The jury could likewise have believed that the irregularities in the hiring of Mr. Jarecki for the job in Count 5 were done to mask First National's

efforts to not hire Mr. Perfetti. Although, as an independent matter, the court may very well have viewed the evidence differently from the jury, that is not the standard for a Judgment Notwithstanding the Verdict. The court will not substitute its judgment for the jury's, so the motion is denied.

The court also denies First National's Judgment Notwithstanding the Verdict motion with respect to the issue of willfulness. The same evidence that supports the jury's verdict on liability supports a finding that the relevant decisionmaker intended to discriminate against Mr. Perfetti. That is all that is necessary to find willfulness. Brown v. M&M/Mars, 883 F.2d 505, 514 (7th Cir. 1989). First National has not had an opportunity to address the question

of whether, upon a finding of willfulness, the court has any discretion in doubling the back pay damages. It may do so in a 5-page brief due September 28, 1990. Mr. Perfetti's reply, also limited to 5 pages, is due October 5, 1990.

The court denies Mr. Perfetti's request for reinstatement. The jury awarded front pay damages of $89,700, which is sufficient to make Mr. Perfetti whole.

First National's reply brief in support of its request for costs is due September 28, 1990.

First National's response to the petition for attorney's fees is due September 28, 1990. Mr. Perfetti's reply is due October 5, 1990.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: Sept. 17, 1990

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

PETER D. PERFETTI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	88 C 8714
THE FIRST NATIONAL BANK OF CHICAGO,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Three issues remain in this case: whether the court has discretion in doubling the back-pay award due to the jury finding of a willful ADEA violation, whether First National is entitled to its costs on the four counts on which it prevailed, and the amount of attorney's fees to be awarded to Mr. Perfetti.

The court has no discretion in doubling the back pay award. The

relevant section of the ADEA, 29 U.S.C. Sec. 626(b), directs the court to 29 U.S.C. Sec. 216(a), which provides: "Any employer who violates the provisions. . . of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation. . . and in an additional equal amount as liquidated damages." This is not the language of discretion. The Eleventh Circuit has explicitly held that a willful finding automatically triggers a doubling of liquidated damages. Spanier v. Morrison's Management Services, Inc., 822 F.2d 975, 979 (11th Cir. 1987). The Seventh Circuit has not addressed the issue, although its footnote in Hybert v. Hearst Corp., 900 F.2d 1050, 1052 n.5 (7th Cir. 1990), is consistent

with First National's position. In the absence of clear guidance from the Seventh Circuit, however, the court will follow what it believes to be the unambiguous, mandatory language of the statute and the unequivocal interpretation of the statute by the Eleventh Circuit. Liquidated damages of $64,900 will be doubled, to $129,800.

The court will allow costs to First National for the four counts on which it prevailed. Fed. R. Civ. P. 54(d). The costs, $2,881.50, will be deducted from the damages award.

The court will reduce the fee petition to account for Mr. Perfetti's lack of success on unrelated claims. The court has already indicated in its rulings on the summary judgment motion and the motions in limine that it

considers the counts in the Complaint to be factually distinct. The court will therefore not award fees for the unsuccessful, unrelated claims. Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1279 (7th Cir. 1983). The court agrees with First National's arithmetic and awards attorney's fees in the first petition in the amount of $57,775. The court will not apply a multiplier in a case where representation was adequate and there were no novel legal issues.

The court agrees with First National that Mr. Perfetti's attorneys claim excessive time in their supplemental petition. The court grants $1,775 of that petition.

The court awards liquidated damages of $126,918.50 ($129,800 minus First

National's costs of $2,881.50); front pay of $89,700; and attorney's fees in the amount of $59,550.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: Nov. 28, 1990

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 6, 1991
BEFORE: Honorable William J. Bauer, Chief Judge; Honorable Harlington Wood, Jr., Circuit Judge; Honorable Jesse E. Eschbach, Senior Circuit Judge

No. 90-3861

PETER D. PERFETTI,
Plaintiff - Apellee

v.

FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,
Defendant - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 88 C 8714, Judge Ann Claire Williams

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED for entry of judgment in the Bank's favor, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

January 8, 1992.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

PETER D. PERFETTI, Plaintiff-Apellee No. 90-3861 v. THE FIRST NATIONAL BANK OF CHICAGO, Defendant-Appellant.	Appeal from the United States District Court for the Northern District Illinois, Eastern Division. No. 88 C 8714 Ann Claire Williams, Judge.

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellee, all of the judges on the panel have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
F I L E D
MAY 28 1992
OFFICE OF THE CLERK

No. 91-1730

In The
Supreme Court of the United States
October Term, 1991

PETER D. PERFETTI,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

*HUBERT O. THOMPSON
CARNEY & BROTHERS, LTD.
30 N. LaSalle Street
Suite 3100
Chicago, IL 60602
(312) 372-2909

LYNN A. GOLDSTEIN
THE FIRST NATIONAL
BANK OF CHICAGO
One First National Plaza
11th Floor
Chicago, IL 60670
(312) 732-6919

Attorneys for Respondent

* *Counsel of Record*

ARMI®
Legal Copies of America (312) 332-2764

QUESTIONS PRESENTED FOR REVIEW

1. Where a plaintiff has demonstrated a prima facie case of age discrimination, may a Court of Appeals reverse a trial court's denial of a motion for judgment notwithstanding the verdict, where the defendant's proffered legitimate, non-discriminatory reason for its hiring decision is its assessment that another candidate had better interpersonal skills than the plaintiff, which assessment is not supported by objective evidence?

2. Did the Court of Appeals violate petitioner's Seventh Amendment rights in reversing the trial court's denial of a motion for judgment notwithstanding the verdict on the grounds that the evidence supporting the verdict was insubstantial?

RULE 29.1 STATEMENT

The parent company of The First National Bank of Chicago is First Chicago Corporation. Subsidiaries of the First National Bank of Chicago that are not wholly owned are Dearborn Park Corporation and Resort Holding Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW . . . i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT . . . 12

I. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE. 12

II. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION DOES NOT VIOLATE THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY. . 19

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: **Page(s)**

Braxton v. United States, ___ U.S.____, 111 S.Ct. 1854 (1991) 13

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) . . . 13,15,16, 17, 18

Board of Trustees of Keene St. Col. v. Sweeney, 439 U.S. 25 (1978) 16,18

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, (7th Cir.), cert. denied. 484 U.S. 477 (1987) 18

Baltimore & Carolina Line v. Redman, 295 U.S. 654, (1934) . . . 19

Galloway v. United States, 319 U.S. 372 (1943) 19, 24

Rule:

Sup.Ct. Rule 10 12

Statute:

ADEA, 29 U.S.C. §621 et seq. . . . 12

No. 91-1730

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

PETER D. PERFETTI,
Petitioner,

v.

THE FIRST NATIONAL
BANK OF CHICAGO,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason

for this Court to exercise its sound judicial discretion to grant the petition.

STATEMENT OF THE CASE

The petitioner worked at The First National Bank of Chicago ("First Chicago") from 1971 to 1986 in a variety of positions involving analysis of operations and methods designed to increase profitability and control costs. His last position at First Chicago was as an Operations Analyst I in the Operations Analysis Group. In September 1986, the entire Operations Analysis Group was disbanded due to a reduction in force ("RIF"). Thereafter, petitioner applied for five different positions at First Chicago. He was not hired for any of them.

Pursuant to First Chicago's RIF policies, petitioner was placed on salary continuation for five months after the Operations Analysis Group was disbanded. The purpose of salary continuation is to

provide the employee with time to look for a new job. During salary continuation, petitioner was allowed to bid on open positions within First Chicago and was considered an internal candidate. In addition to allowing employees to bid internally for jobs, First Chicago provides use of the Career Counseling Center to employees after a RIF. The Center provides secretarial and out placement services, including counseling about job searches and interviewing techniques.

Nancy Seever, who managed the Center for First Chicago, worked with petitioner in the Center while he was looking for a job. Her impression of petitioner at the time was that he thought First Chicago owed him a job, he was acting like a jerk and he had an attitude problem. Robert Chapman, a First Chicago recruiter, concurred that during this time petitioner came across as angry and hostile.

On November 13, 1986, while still on salary continuation, petitioner applied for an Operations Analyst I position in the Retail Banking Services Group of the Consumer Bank Group. Although this job had the same title as petitioner's last job at First Chicago, it was in a different division. The environment within which this new position would be performed was not the same as the environment within which petitioner had previously functioned. The new position required working with the same operations people day after day, rather than doing a consulting job in one area of the bank and then leaving.

Because of the nature of the job and the group of individuals involved, the hiring manager, Maria McSweeney, determined that strong interpersonal skills were very important for success in this position. This was reflected on the job posting form. Chapman, the recruiter for the job, reviewed

petitioner's bid sheet and resume and determined he was at least minimally qualified for the job. Chapman also reviewed the qualifications of another candidate, Rose Carter. Chapman thought that Carter's overall package of qualifications was stronger than petitioner's for this particular position. Carter's educational background was much stronger than petitioner's -- she had a masters degree in management and petitioner had an associates degree in industrial electronics and electric power. In addition, petitioner's interpersonal skills were not nearly as well-developed as Carter's. At the time, petitioner was angry and hostile and came across as somewhat egocentric, which hampered his interpersonal skills. Carter's interpersonal skills were very strong and well-developed and she communicated effectively. Although Chapman thought Carter was a stronger candidate, he

referred both candidates to McSweeney without indicating any personal preferences.

McSweeney interviewed about six people for the position, including petitioner and Carter. McSweeney believed that each candidate comes as a whole package which includes skill, experience and education. She concluded after a one hour interview that petitioner's "package" was not what she was looking for because he lacked the interpersonal and communication skills that were needed for this position.

McSweeney testified that during the interview she observed petitioner's communication skills and demeanor and noticed several problems with his interpersonal skills. Petitioner frequently tried to pressure her and at times his communication was inappropriate for an interview. McSweeney concluded if his communication and interpersonal skills were not appropriate during an interview when a

person was trying to do his best, there was no indication the appropriate skills would be there in a consulting situation.

McSweeney also testified that petitioner related an incident in which he had told a First Chicago vice president that he was right about how to conduct a particular project and that the vice president was wrong. Petitioner denied making this statement. However, petitioner did tell Nancy Seever after his interview with McSweeney that he had told McSweeney that he would do things his way rather than McSweeney's if they disagreed. Carter, on the other hand, made a good impression on McSweeney during the interview -- she was personable and effervescent and demonstrated good communication skills. McSweeney felt Carter was the kind of person you could send into a tricky situation and she would do well. McSweeney decided that Carter was a better candidate than petitioner and hired

her. McSweeney's notes at the time reflect that she decided not to hire petitioner because "other candidates had skill/experience/education 'packages' that might be preferable." Chapman called petitioner and told him he did not get the job because they found someone more suitable.

On March 5, 1987, after he was off the First Chicago payroll and no longer considered an internal candidate, petitioner applied for a Facilities Coordinator I position. First Chicago's hiring policies require that all internal candidates must be considered and eliminated before any external candidates can be considered.

The job was posted internally from March 4-10, 1987. Bob Chapman received petitioner's resume as an application for the job on March 5, 1987. On March 10, 1987, Ray Altmann, the hiring manager, told Chapman that he had offered the Facilities

Coordinator I position to an internal candidate, Tom Jarecki. Chapman, therefore, did not tell Altmann about petitioner's application. Chapman called petitioner and told him an internal candidate had been hired for the job.

Altmann offered the position to Jarecki because Jarecki had been working on starting up the mortgage processing business and had experience in the area. Jarecki took the job and performed it for a short period of time and then became frustrated and went back to his former position. Altmann never got around to processing the paper work for the promotion Jarecki should have received by taking the position. After Jarecki left the position, Altmann merged the responsibilities of the Facilities Coordinator I position with those of another First Chicago employee, Terry Soderberg.

On October 13, 1988, petitioner filed this action in the United States District

Court for the Northern District of Illinois. He alleged that First Chicago discriminated against him on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq., because it failed to hire him for any of the positions for which he applied after the RIF and because it failed to promote him prior to the RIF. Petitioner did not challenge the RIF decision itself.

On November 17, 1989, the trial court granted First Chicago's motion for summary judgment with respect to Counts 1, 3, 4 and 6 of the Complaint. Counts 2 and 5 of the Complaint alleging the First Chicago failed to hire petitioner for the Operations Analyst I and the Facilities Coordinator I positions, proceeded to trial before a jury on January 12, 1990.

First Chicago moved for a directed verdict on both counts of the Complaint at the close of plaintiff's case. The trial

court took the motion under advisement. First Chicago renewed its motion for directed verdict at the close of its case and at the close of all of the evidence. The trial court never ruled on the motion.

On January 22, 1990, the jury returned a verdict that age was a determining factor in the decision not to hire petitioner for both positions. The jury also found that the hiring decisions were made in willful violation of the ADEA. The jury determined that petitioner was entitled to $64,900 in back pay and $89,700 in front pay. First Chicago moved for judgment notwithstanding the verdict on February 12, 1990. The District Court denied First Chicago's motion on September 17, 1990. The District Court also denied petitioner's request for reinstatement and awarded front pay in the amount determined by the jury.

On November 28, 1990, the District Court entered an order doubling petitioner's

back pay award to $129,800, awarding front pay of $89,700 and attorneys' fees in the amount of $59,550. The Court awarded costs to First Chicago in the amount of $2,881.50 and to petitioner in the amount of $11,564.30.

On December 27, 1990, First Chicago filed its Notice of Appeal to the Seventh Circuit. The Seventh Circuit reversed the denial of the motion for judgment notwithstanding the verdict and remanded for entry of judgment in favor of First Chicago.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE.

The issuance of a writ of certiorari is not a matter of right but a matter of this Court's discretion. Sup. Ct. Rule 10. The principal purpose for which this Court uses certiorari jurisdiction is to resolve

conflicts among Circuit Courts of Appeal and state courts concerning the meaning of provisions of federal law. Braxton v. United States, ___ U.S.___, 111 S.Ct. 1854 (1991). Here, the petitioner has not alleged that there is a conflict in decisions among the Circuits. Rather, the petitioner claims that the decision by the Seventh Circuit reversing the denial of First Chicago's motion for judgment notwithstanding the verdict conflicts with this Court's decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Petitioner relies on Burdine for the proposition that the employer must be required to present objective evidence to support its assessment that another candidate had better interpersonal skills than the petitioner. Burdine expressly rejects such a requirement.

In this case, Maria McSweeney, a hiring manager for First Chicago, interviewed

several candidates for the position of Operations Analyst I; among them were the petitioner and Rose Carter. Both of these candidates met the minimum qualifications for the position[1]. After an approximately one hour interview with each of these candidates, Ms. McSweeney chose Rose Carter for the position because Ms. McSweeney concluded that Ms. Carter had stronger interpersonal skills than petitioner.

Petitioner urges this Court to hold that when an employer is faced with a choice

---

[1] The qualifications for the Operations Analyst I position were as follows:

> 3-6 yrs. consulting and/or related operations management experience necessary. Previous project management essential (knowledge of methods, analysis, work measurement etc.) Strong interpersonal skills as well as analytical capabilities and an ability to work independently are required to function successfully in this position.

(Emphasis added.)

between a person who is not in the protected class and a person who is, the employer must select the person in the protected class unless the employer can prove by objective criteria that the person not in the protected class is better qualified. Petitioner is in error.

In Burdine, the plaintiff brought an action against the Texas Department of Community Affairs ("TDCA") alleging sex discrimination in TDCA's firing plaintiff and hiring a male for the position of Project Director, a position for which the plaintiff had applied. The district court found no evidence of discrimination in the decision not to promote and to terminate the plaintiff and entered judgment for the defendant. The Fifth Circuit reversed holding that the defendant had the burden of proving by objective evidence that those hired or promoted were better qualified than the plaintiff. Burdine, 450 U.S. at 252.

The Burdine Court rejected the Fifth Circuit's "objective evidence" standard, holding as follows:

> The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. McDonnell Douglas teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. The Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated.

Burdine, 450 U.S. at 258. Thus, the argument that First Chicago be required to prove that Rose Carter was more qualified than the petitioner was specifically rejected by the Burdine Court. See also Board of Trustees of Keene St. Col. v. Sweeney, 439 U.S. 25 (1978). Such a requirement would eliminate the use of personal interviews in the hiring process.

Yet, the ADEA, like Title VII, was not intended to "diminish traditional management prerogatives." Burdine, 450 U.S. at 259. The Burdine Court rejected the notion that an employer must hire the person in the protected class whenever that person's objective qualifications are equal to those of a white male applicant. "Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." Burdine, 450 U.S. at 259.

In the present case, First Chicago chose between two candidates, both of whom met the minimum qualifications for the position of Operations Analyst. This Court has consistently held that the employer is not constrained to hire a member of the protected class whenever that person has the minimal qualifications for the position. Nor is the employer required to prove that its decision in selecting a person not

within the protected class was based upon objective criteria, since such a rule would diminish traditional management prerogatives and would transfer to the employer a burden of persuasion that is properly the plaintiff's. Burdine, 450 U.S. at 257; Sweeney, 439 U.S. at 25. Even if Ms. McSweeney mistakenly concluded that Rose Carter had better interpersonal skills than the petitioner, such a mistake would not constitute pretext. Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987).

Far from conflicting with this Court's decision in Burdine, the Seventh Circuit decision below is entirely consistent with this Court's precedents. There is no basis for granting the petition for a writ of certiorari on this issue.

II. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION DOES NOT VIOLATE THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

The petitioner alleges that the Court of Appeals violated his Seventh Amendment rights by imposing its inferences and conclusions as to the conflicting evidence in reversing the jury verdict. Pet. at 33. Petitioner's argument apparently does not challenge generally the power of federal courts to grant judgment notwithstanding the verdict where the evidence is insufficient to sustain a verdict[2]. However, petitioner claims that in weighing the conflicting evidence in this case, the Seventh Circuit

---

[2]The federal courts have long held that the purpose of the Seventh Amendment is to preserve the common law distinction between the province of the court and that of the jury, whereby issues of law are to be resolved by the court and issues of fact are to be determined by the jury. Whether the evidence is sufficient is a question of law to be resolved by the court. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657-658 (1934); Galloway v. United States, 319 U.S. 372 (1943).

rejected proper inferences drawn by the jury and substituted its own. Petitioner's argument is without merit.

The fallacy of petitioner's argument begins with the premise that there was conflicting evidence concerning any of the material facts. With one exception, there was no dispute as to any fact that was material to a determination of the merits as to either of the two jobs at issue.

As to the Operations Analyst I job, there was no dispute that Ms. McSweeney interviewed about six candidates for the position; that both Rose Carter and the petitioner met the minimum qualifications for the job; that strong interpersonal skills was an important qualification for the position; that Ms. McSweeney concluded that Rose Carter had strong interpersonal skills and that the petitioner had poor interpersonal skills; that Robert Chapman, a recruiter for First Chicago, and Nancy

Seever, the manager of First Chicago's Career Counseling Center, concurred that at that time, the petitioner had the attitude that First Chicago owed him a job, was acting like a jerk and was angry and hostile. There was also no dispute that two of petitioner's former co-workers believed that petitioner had strong interpersonal skills, but that they did not communicate their impressions to Ms. McSweeney.

The only fact in dispute concerning the Operations Analyst I position was whether petitioner related a particular incident to Ms. McSweeney in which he had told a First Chicago vice president that petitioner was right about how to conduct a particular project and that the vice president was wrong. The Seventh Circuit correctly resolved this factual dispute in favor of petitioner. However, even excluding the evidence concerning the statement to the

vice president, there was insufficient evidence to sustain a jury verdict.

The testimony of Robert Chapman and Nancy Seever concerning petitioner's attitude at the time of his interview was unrebutted, as was the testimony of Ms. McSweeney that her assessment of petitioner's interpersonal skills was not based on this one incident but on the entire hour long interview. Furthermore, the testimony of petitioner's co-workers concerning his interpersonal skills did not conflict with Ms. McSweeney's assessment that Rose Carter's interpersonal skills were stronger than petitioner's.

Similarly, as to the Facilities Coordinator I position, there were no material facts in dispute. The evidence is undisputed that at the time of the posting for the position, petitioner was no longer an employee of First Chicago and was considered an external candidate; First

Chicago's policy does not allow hiring managers to consider external candidates, such as petitioner, until all internal candidates have been considered and eliminated; at the end of the posting period, Ray Altmann, the hiring manager, informed the recruiter, Mr. Chapman, that he had offered the position to Tom Jarecki, an internal candidate. Accordingly, Mr. Chapman never told Mr. Altmann that petitioner had submitted an application for the job. The evidence is also undisputed that Jarecki remained in the position only a short time, became dissatisfied and returned to his prior position. Afterwards, the functions of the position were assigned to another current employee of First Chicago, and no other person was hired.

Petitioner alleges that the jury should have been allowed to draw inferences that the hiring of Jarecki was a "flim-flam" perpetuated solely to deprive petitioner of

the position. Petitioner relies heavily on the fact that First Chicago produced the documentary evidence reflecting the hiring of Jarecki after the close of discovery. The Seventh Circuit correctly found that no reasonable jury could have disbelieved all of First Chicago's evidence. Furthermore, there was absolutely no evidence that the documents were fabricated. And while the jury may be allowed to draw reasonable inferences from the evidence, it cannot be allowed to speculate in the absence of evidence. Galloway v. United States, 319 U.S. at 395.

Petitioner's claim that the Court of Appeals violated his Seventh Amendment rights by supplanting the jury's permissible inferences with its own is not supported by the evidence. The Court of Appeals determined that the evidence supporting plaintiff's age discrimination claims was insufficient as a matter of law to sustain

the jury verdict. Such a determination is wholly consistent with the dictates of the Seventh Amendment. The Seventh Circuit did not improperly reweigh the evidence or impose its inferences on the evidence in derogation of the jury function.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

FIRST NATIONAL BANK OF CHICAGO

*Hubert O. Thompson
CARNEY & BROTHERS, LTD.
30 North LaSalle Street
Suite 3100
Chicago, Illinois 60602
(312)372-2909

Lynn A. Goldstein
The First National Bank
of Chicago
One First National Plaza
11th Floor
Chicago, IL 60670
(312) 732-6919

Attorneys for Respondent
*Counsel of Record